

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

8 CODY CORY LEAVITT,

9 Petitioner,

10 vs.

11 DWIGHT NEVEN, *et al.*,

12 Respondents.  
13

)  
)  
) 2:12-cv-00987-JCM-CWH  
)  
)

**ORDER**

14 This is a habeas corpus action brought under 28 U.S.C. § 2254. On August 26, 2016, this  
15 court entered an order lifting the stay of these proceedings and giving respondents 60 days to file and  
16 serve an answer or other response to petitioner Leavitt's amended petition (ECF No. 54). ECF No.  
17 79. Now pending before the court is respondents' motion to dismiss. ECF No. 102. In addition, the  
18 petitioner and the respondents have filed numerous non-dispositive motions. ECF Nos. 81, 82, 84,  
19 87, 88, 89, 91, 92, 93, 94, 96, 97, 98, 102, 107, 108, 115, 118, and 119. This order decides all the  
20 foregoing motions.

21 With their motion to dismiss, respondents argue that Grounds 1, 3, 4, 6, a portion of Ground  
22 7, and Ground 8 should be dismissed as procedurally defaulted.<sup>1</sup> These are the grounds this court  
23 determined to be unexhausted in its order of March 9, 2015, prior to granting Leavitt an exhaustion  
24

---

25 <sup>1</sup> Respondents also identify Ground 2 as a procedurally defaulted claim, however, that claim has  
26 already been dismissed with prejudice for failure to state a cognizable claim for federal habeas relief.  
ECF No. 60.

1 stay. ECF No. 60. In support of their motion to dismiss, respondents contend that Leavitt did not  
2 fairly present these claims to the state court, despite being granted a stay of that purpose. More  
3 specifically, respondents contend that Leavitt filed a state post-conviction petition that merely stated  
4 as grounds “see habeas” and alleged thereunder that “counsel never sent any pages after p. 66.” See  
5 ECF No. 103-1. Respondents further contend that Leavitt filed a supplemental state petition that  
6 presented various claims, but none of the unexhausted claims in his amended federal petition. See  
7 ECF No. 103-2. As an alternative or additional basis for finding that Leavitt’s claims remain  
8 unexhausted, respondents note that the Nevada Supreme Court dismissed as untimely Leavitt’s  
9 appeal of the state district court’s determination that his state post-conviction petition was  
10 procedurally barred under Nevada law. See ECF No. 103-5.

11 In response to Leavitt’s claim that he submitted a copy of his amended federal petition as part  
12 of his state petition, respondents have provided a copy of the amended federal petition stamped  
13 “received” by the state court on November 3, 2015. ECF No. 120-1. However, the document is also  
14 stamped “please file left side.” *Id.* Presumably because it was not physically attached to the state  
15 petition and bore a federal court case number and caption, the document was lodged, but not  
16 formally filed, in Leavitt’s state post-conviction proceeding.

17 Whether or not this was sufficient to fairly present the claims in the amended federal petition  
18 to the state court is not an issue that must be resolved here because, in either case, the claims are  
19 procedurally defaulted. If this court were to determine that the claims were fairly presented to the  
20 state district court, Leavitt’s untimely appeal resulted in the claims being procedurally barred by the  
21 Nevada Supreme Court. Nevada law deprives the Nevada Supreme Court of jurisdiction over  
22 untimely appeals. *Lozada v. State*, 871 P.2d 944, 946 (Nev. 1994). The late appeal does not mean  
23 that Leavitt did not fairly present his claims to the Nevada Supreme Court, but, instead, that the  
24 claims are “procedurally barred under the independent and adequate state ground doctrine, which  
25 prohibits federal habeas review ‘when a state court declined to address a prisoner’s federal claims  
26

1 because the prisoner had failed to meet a state procedural requirement.” *Correll v. Stewart*, 137  
2 F.3d 1404, 1417 (9<sup>th</sup> Cir. 1998) (quoting *Coleman v. Thompson*, 501 U.S. 722, 732 (1991)).

3 If, on the other hand, this court were to determine that the claims were not fairly presented to  
4 the state district court, it is clear at this point that no state remedies are currently available to Leavitt.  
5 That is, if Leavitt were to return to state court and present his federal habeas claims, the state courts  
6 would find the claims procedurally barred as untimely and successive.<sup>2</sup> “An unexhausted claim will  
7 be procedurally defaulted, if state procedural rules would now bar the petitioner from bringing the  
8 claim in state court.” *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9<sup>th</sup> Cir. 2014). Thus, even if not  
9 exhausted in the conventional sense, Leavitt’s claims are technically exhausted and procedurally  
10 defaulted.

11 The *Coleman* Court explained the effect of a procedural default:

12 In all cases in which a state prisoner has defaulted his federal claims in state  
13 court pursuant to an independent and adequate state procedural rule, federal habeas  
14 review of the claims is barred unless the prisoner can demonstrate cause for the  
15 default and actual prejudice as a result of the alleged violation of federal law, or  
16 demonstrate that failure to consider the claims will result in a fundamental  
17 miscarriage of justice.

18 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

19 To demonstrate cause for a procedural default, the petitioner must be able to “show that some  
20 objective factor external to the defense impeded” his efforts to comply with the state procedural rule.  
21 *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external impediment must have  
22 prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

---

23 <sup>2</sup> Pursuant to Nev. Rev. Stat. § 34.726(1), a petition that challenges the validity of a judgment  
24 or sentence must be filed within one year after entry of the judgment of conviction or within one year  
25 after the appellate court issues its remittitur unless there is good cause for the delay. Pursuant to Nev.  
26 Rev. Stat. § 34.810(2), (3), a judge must dismiss a second or successive petition if the petition fails to  
demonstrate good cause for the petitioner's failure to present the claim in the original petition. The state  
district court imposed both bars in dismissing Leavitt’s 2015 state post-conviction petition. ECF No.  
103-4.

1 To demonstrate a fundamental miscarriage of justice, a petitioner must show the  
2 constitutional error complained of probably resulted in the conviction of an actually innocent person.  
3 *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). “[A]ctual innocence’ means factual  
4 innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). This  
5 is a narrow exception, and it is reserved for extraordinary cases only. *Sawyer v. Whitley*, 505 U.S.  
6 333, 340 (1992). Bare allegations unsupplemented by evidence do not tend to establish actual  
7 innocence sufficient to overcome a procedural default. *Thomas v. Goldsmith*, 979 F.2d 746, 750 (9th  
8 Cir. 1992).

9 This court granted Leavitt a stay for the sole purpose of returning to state court to exhaust his  
10 federal claims. Thus, it is difficult to conceive how he might demonstrate cause for his procedural  
11 default.<sup>3</sup> Nonetheless, before dismissing his claims as procedurally defaulted, this court will give  
12 Leavitt notice of the procedural default and an opportunity to respond. *See Boyd v. Thompson*, 147  
13 F.3d 1124, 1127 (9<sup>th</sup> Cir. 1998); *see also Windham v. Merkle*, 163 F.3d 1092, 1101 (9<sup>th</sup> Cir. 1998).

14 **IT IS THEREFORE ORDERED** that respondents’ motion to dismiss (ECF No. 102) is  
15 GRANTED. Grounds 1, 3, 4, 6, a portion of Ground 7,<sup>4</sup> and Ground 8 of the amended petition (ECF  
16 No. 54) are procedurally defaulted.

17 **IT IS FURTHER ORDERED** that Petitioner shall have **forty-five (45) days** from the date  
18 this order is entered to file a written response and show cause why the defaulted claims should not be  
19

---

20 <sup>3</sup> With respect to ineffective assistance of trial counsel claims, the Supreme Court in *Martinez*  
21 *v. Ryan*, 566 U.S. 1 (2012), held that when a State requires a prisoner to raise such a claim in a collateral  
22 proceeding, a prisoner may establish cause for a default of the claim where the state courts did not  
23 appoint counsel in the initial-review collateral proceeding or where appointed counsel in the  
24 initial-review collateral proceeding was ineffective under the standards of *Strickland v. Washington*, 466  
U.S. 668 (1984). 566 U.S. at 14. *Martinez* does not assist petitioner here though because the Court in  
*Martinez* made clear that this holding is limited to attorney errors (or lack of counsel) in *initial-review*  
collateral proceedings. 566 U.S. at 16.

25 <sup>4</sup> Previously identified as the part of the claim alleging errors other than the trial court’s abuse  
26 of discretion in limiting the evidentiary hearing to issues of ineffectiveness of counsel and in not  
allowing petitioner to withdraw his guilty plea. ECF No. 60.

1 dismissed with prejudice. In responding to this order, petitioner must show by declaration and any  
2 properly authenticated exhibits what, if any, factual or legal basis he has for claiming that his  
3 defaults should excused.


4 Petitioner is warned that if a timely response to this order is not made, petitioner will waive  
5 his right to respond and the court will, without further notice, issue an order dismissing the defaulted  
6 claims with prejudice.

7 **IT IS FURTHER ORDERED** that, should petitioner file a timely response, respondents  
8 shall thereafter have **thirty (30) days** to file their opposition. The matter shall then be deemed  
9 submitted for the court's consideration.

10 **IT IS FURTHER ORDERED** that petitioner's motion to supplement the record (ECF No.  
11 81) and motions for leave to file (ECF Nos. 115 and 118) are GRANTED. Petitioner's remaining  
12 motions (ECF Nos. 88, 89, 91, 92, 93, 94, 96, 98, 107, and 108) are DENIED.

13 **IT IS FURTHER ORDERED** that respondents' motions for extensions of time (ECF Nos.  
14 82, 84, 87, and 97) and motion for late filing (ECF No. 119) are GRANTED *nunc pro tunc* as of  
15 their respective filing dates.

16 Dated September 26, 2017.

17  
18   
19 UNITED STATES DISTRICT JUDGE  
20  
21  
22  
23  
24  
25  
26